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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 49

UNITED GAS PIPE LINE COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION AND
CONTINENTAL OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 485-501) is reported at 350 F. 2d 689. The opinion of the Federal Power Commission (R. 395) is reported at 31 F.P.C. 1079; its opinion on rehearing (R. 459) is reported at 32 F.P.C. 8.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1965 (R. 502), and a timely petition for rehearing denied on October 8, 1965 (R. 505).

The petition for a writ of certiorari was filed on January 3, 1966, and granted on February 28, 1966 (R. 506, 383 U.S. 924). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 15 U.S.C. 717r(b).

QUESTION PRESENTED

Upon the expiration of its contract to purchase gas from Continental Oil Company in the Johnson Bayou Field in Louisiana, United Gas Pipe Line Company desired to discontinue further takings of gas from this source, and accordingly shut down the facilities it had constructed to enable it to take the gas. The basic question presented is whether United was required to obtain the Commission's approval of this step.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, are set forth in the Appendix, *infra*, pp. 29-33.

STATEMENT

In the order under review, the Federal Power Commission found that the action of United Gas Pipe Line Company in ceasing to accept deliveries of natural gas from Continental Oil Company in the Johnson Bayou Field in Louisiana was an unauthorized

abandonment under Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b), and directed United to resume.[1] The facts giving rise to the order may be briefly summarized.

On January 22, 1953, Continental and United executed a contract for the sale and purchase of gas from the Johnson Field for a primary term of 10 years commencing January 31, 1953, the contract to continue in effect after the end of the 10-year term on an annual basis with either party free to terminate by giving 90 days' written notice (R. 181, 196, 396). The Johnson Field is adjacent to United's 16-inch Mud Lake transmission line, which extends westward from Southwest Louisiana into Texas. The contract provided that Continental was to deliver the gas to a central point near this line. To effectuate delivery, Continental constructed 4,400 feet of 2½ inch pipe line, two separators, and several storage tanks, while United constructed another separator, a meter station, about 55 feet of 4-inch pipeline, and valves.[2]

Since gas covered by the contract was to be transported in interstate commerce for resale (R. 397), United applied in September 1954 for a certificate of public convenience and necessity under Section 7(c) of the Natural Gas Act, 15 U.S.C. 717f(c) (App., *infra*, p. 32) authorizing the transportation of gas

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[1] Authority to issue such orders is granted the Commission by Section 16 of the Act, 15 U.S.C. 717*o*.

[2] The total cost of the facilities constructed by United was $6,884 (R. 397).

from the Johnson Field and the operation of the facilities constructed by United for that purpose. On February 25, 1955, the Commission issued United such a certificate. *United Gas Pipe Line Co.*, 14 F.P.C. 582. Similarly, Continental, on November 30, 1954, filed the sale and purchase contract with the Commission (R. 397), which, on January 4, 1956, issued Continental a certificate of public convenience and necessity authorizing the sale, and the operation of the facilities constructed by Continental to make the sale. *Continental Oil Co.*, 15 F.P.C. 1650.

On October 23, 1962, Continental gave notice of its intention to terminate the contract at the end of the primary term on January 31, 1963 (R. 397). After attempts to negotiate a new contract failed, Continental filed a supplement to the rate schedule that it had filed with the contract. The supplement provided for an increase in price to 14 cents per Mcf (plus 1.75 cents for tax reimbursement), which Continental proposed to make effective on January 31, 1963 (R. 397-398).[3]

Over United's objection, the Commission accepted the increased-rate filing. The Commission did not suspend the increased rate (as Section 4(e) of the Act, 15 U.S.C. 717c(e), empowers it to do, for a period not to exceed five months, pending a hearing on the reasonableness of the changed rate), since the new price was the area guideline price for increased rates

[3] The contract price applicable to sales after January 31, 1958, had been 8.997 cents per Mcf plus tax reimbursement (R. 195, 397).

and United did not suggest that it was unjust or unreasonable. *Continental Oil Co.*, 29 F.P.C. 525, 526.[4]

After Continental filed its increased rate, United notified Continental that it would cease purchasing from the Johnson Bayou Field at 7:00 a. m., January 31, 1963[5] (R. 251, 398); and it did.[6] On February 1, 1963, Continental asked the Commission to direct United "* * * to show cause why it should not be required to continue to take deliveries of gas produced by Continental in the Johnson Bayou Field * * * at the currently filed and effective rate," and to order United to continue taking the gas in the meantime (R. 242, 398). The Commission declined to order interim relief but directed United to show cause "why it should not be required to apply for and obtain the permission and approval of the Federal Power Commission before ceasing the operation of all or any portion of the facilities heretofore operated by United to purchase natural gas from Continental * * *" (R. 267-271, 398-399).

After a hearing, the presiding examiner rendered his initial decision, vacating the Commission's order to show cause (R. 324-334). On exceptions, and after oral argument, the Commission held that United's

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[4] United did not seek judicial review of the Commission's order accepting Continental's increased-rate filing.

[5] United stated that if Continental desired to continue delivering gas at the price provided by the terminated contract, it should notify United (R. 252).

[6] It resumed purchasing only when the Commission so ordered it (see p. 6, *infra*) and the court of appeals refused to stay the order.

refusal to make any use, for an indeterminate time, of the facilities for the purchase of gas from Continental constituted an unauthorized abandonment within the meaning of Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b). The Commission ordered United to resume purchasing gas at the filed rate (R. 407, 408). The Court of Appeals for the Fifth Circuit, on September 8, 1965, upheld the Commission's order.

ARGUMENT

Introduction and Summary

A.

In the Natural Gas Act, Congress legislated a comprehensive scheme for the regulation of the natural gas industry by the Federal Power Commission. The congressional purpose was basically twofold. On the one hand, Congress desired to protect consumers of natural gas from abuses—principally in the form of exorbitant rates—of the economic power often enjoyed by natural gas companies. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610-612. To this end, the Commission was given broad authority over rates, for example in Section 4(e) of the Act, which empowers the Commission to suspend increased rates for five months pending hearings in which the burden is upon the natural gas company to establish that the increased rate is just and reasonable.

But it is apparent that Congress had a broader objective as well—to promote efficiency, prevent waste, and, in general, foster sound economic conditions in the gas industry. The principal implement-

ing provision is Section 7. Under that section no company may—without the Commission's approval—engage in the transportation or sale of natural gas within the Commission's jurisdiction; construct, extend, acquire, abandon or operate any facilities used in that transportation or sale; or abandon a service rendered by means of any such "jurisdictional" facilities.[7] The Commission thus has extensive powers to prevent excessive entry into the industry, unnecessary duplication of facilities, and imprudent or precipitate expansion, and to encourage maximum utilization of existing facilities. The basic question in the present case is whether these regulatory objectives require that a pipeline company seek Commission approval in order to discontinue the transportation of gas after expiration of its contract with the producer of that gas.

B.

United Gas Pipe Line Company (petitioner) entered into a contract to purchase gas from Continental Oil Company in the Johnson Bayou Field in Louisiana. To provide direct delivery to United's existing pipeline, each company constructed additional facilities. The contract was to run for 10 years. Toward the

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[7] The abandonment provision has a specific function in the scheme of the Act in addition to the promotion of sound conditions generally—to prevent a natural gas company from using threats to abandon service as a method of coercing the other party to the contract into accepting unfavorable terms. See Hearings on H.R. 11662 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess., p. 92. While this purpose normally relates more to a pipeline's dealing with its customers, it is also

end of this period, Continental filed a new, increased rate to take effect upon expiration of the contract. The Commission held that United, unless it brings a proceeding under Section 7(b) (abandonment), must continue to take gas from Continental in the Johnson Field as before; and that, unless the rate increase put into effect by Continental is suspended or reduced by the Commission, it is the lawful rate and United must pay it. United contends that these rulings are error.

The issue has two fundamental aspects. The first is whether the requirement of obtaining the Commission's approval for abandoning jurisdictional facilities (or a service rendered by means of them) is applicable where the facilities relate primarily to the purchasing of the gas from the producer. The second is whether, if so, it makes any difference from the standpoint of the Commission's power that the facilities were originally constructed in performance of a contract that has since expired. This in turn raises a subsidiary question—what rate is applicable to post-contract deliveries which United, not having sought authorization to abandon, is required to take?

We start from the proposition that Section 7(b) is applicable in terms to an abandonment of *all or any portion* of a natural gas company's jurisdictional facilities and to *any* service rendered thereby. There can be no doubt that United's conduct in terminating deliveries constitutes an abandonment of the delivery facilities that it constructed, as well as of the service

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relevant where the pipeline uses the threat of abandonment to coerce a producer (which cannot abandon without Commission approval, see p. 24, *infra*) to continue to accept a very low contract price.

rendered by means of those facilities. It is also clear that the facilities and service in question are within the purview of the statute. The facilities are jurisdictional. United was required to (and did) obtain from the Commission a certificate of public convenience and necessity for their operation and for the transportation of gas by means of them. In addition, regulation of such abandonments is necessary to effectuate the Commission's recognized authority over abandonments of producers' facilities and to achieve fully the regulatory objectives of Section 7. Conduct like United's, as we shall demonstrate, may frequently entail wastage of gas, unnecessary expenses by pipeline and producer for substitute facilities, inefficient pipeline service, and higher costs to consumers.

It is immaterial that Congress has not required Commission approval of gas purchases as such. There was no occasion to grant such power, since the Commission's authority over the transportation of gas subsumes broad regulatory power over purchasing. In addition, it is a familiar principle of public utility regulation, and one plainly intended by Congress to be incorporated in the abandonment provisions of the Gas Act, that discontinuance of a service may be subject to regulation even where initiation is not—this because of the dependence on an existing utility service that consumers develop.

Nor is the Commission's power over United's abandonment affected by the fact that the service in question was initiated pursuant to a contract. The contract was never intended to govern the relations of the parties after its termination—the issue here; nor

may regulated gas companies curtail the Commission's statutory duties by contract.

Since the contract has expired, it follows, we believe, that the current lawful rate is the rate newly filed by Continental. That rate has not been suspended (indeed, its reasonableness has not been questioned), and it must govern unless and until the Commission authorizes abandonment of the underlying service or affirmatively exercises its rate-making powers under Section 5.[8]

C.

We advert to a further consideration—although it is not an issue directly presented by this case—whether United will pay more for its gas if its claim of a unilateral right to abandonment is rejected. Its contract with Continental having expired, United will in no event be entitled to purchase gas at the low rate fixed in the contract. That it can obtain substitute gas below the increased rate filed by Continental is more than doubtful; that rate does not exceed the ceiling that the Commission has fixed for producers' increased rates in the area in question. (If Conti-

[8] United also raises a constitutional question. It argues that if the Act forces it to buy gas on terms unilaterally imposed by the seller, without consideration of its needs as a buyer, there is a taking without compensation in violation of the Fifth Amendment. But this issue is clearly premature. United has yet to challenge the rate filed by Continental or to ask the Commission for permission to abandon. As noted in the text, below, the Act provides United with adequate remedies against being forced to take gas on disadvantageous terms; having sought none of these remedies, United is in no position to contend that it is being deprived of a property right without adequate compensation.

nental's new rate had exceeded the ceiling, the Commission would have suspended it.) In fact, United, before the Commission ordered it to resume taking Continental's gas, was apparently paying more for gas, not less, than if it had continued to purchase from Continental at the increased rate.[9] It should also be noted that if Continental's new rate were excessive, that in itself would be a persuasive basis for United's seeking permission to abandon under Section 7(b) or inviting the Commission to reduce the rate. It has followed neither course.

We note these considerations in order to stress the Commission's ample authority to protect, over the course of the post-contractual dealings between pipeline and producer, both the parties and the public. The nub of this case is whether that course of dealings is to be controlled by the Commission, acting in the public interest, or by the pipeline's unilateral decision to terminate. The facts of the present case indicate that the latter method is not likely to result

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[9] That rate is 15.75¢, and the record shows that while United was declining to take gas from Continental at that rate it was entering into some new purchases of gas at prices ranging from 18¢ to 19.75¢ (R. 23-27, 33). This may reflect the fact that rates for initial (new) service are ordinarily higher than rates for old service. Thus, the Southern Louisiana guideline price announced on October 25, 1960, for initial service was 21.5¢ exclusive of tax reimbursement. This was changed on October 31, 1961, to 21.25¢ inclusive of State taxes. Fourth Amendment to Statement of General Policy No. 61-1, 26 F.P.C. 661. The guideline price for rate changes has, since September 28, 1960, remained fixed at 14¢ exclusive of tax reimbursement of 1.75¢. Statement of General Policy No. 61-1, 24 F.P.C. 818.

in lower costs to the pipeline's ratepayers.[10] And one can readily conceive of instances where such termination would be improvident and harmful from the standpoint of the total health of the industry. At all events, we believe it clear that such decisions are not to be left to unfettered private choice.

I

It Is an Abandonment within the Meaning of Section 7(b) of the Natural Gas Act for a Pipeline to Cease Taking Deliveries of Gas for Transportation by Facilities within the Commission's Jurisdiction

A. *The Language of the Statute Clearly Compels This Result; So Does Its Purpose—to Prevent Waste and Inefficient Plant Utilization*

1. Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b), provides:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

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[10] It is true that there are indications (see R. 23-27, 33) that United's purchases at rates higher than Continental's post-contract rate may not have been substitute purchases. But this is precisely the kind of fact question that could be fully developed only in an abandonment proceeding.

It is not open to serious doubt that United's action in terminating receipt of gas from Continental's Johnson Bayou Field constitutes an abandonment. To be sure, United has not removed or altered the facilities it constructed to receive the gas, but Section 7(b) does not require dismantling. It is enough that a service has been cut off indefinitely. *Panhandle Eastern Pipe Line Co.* v. *Michigan Consol. Gas Co.*, 177 F. 2d 942 (C.A. 6). Whether there is intent to resume seems of doubtful relevance, but in any event the record shows that United had no present intention of resuming (R. 401-402).

It is also clear that this was an abandonment of facilities subject to the Commission's jurisdiction. It is undisputed that the pipeline and other facilities installed by United to take gas from Continental at the Johnson Field were intended to be, and were, used for "the transportation of natural gas in interstate commerce" and hence were subject to the Commission's jurisdiction (Section 1(b), 15 U.S.C. 717(b)). Nothing in Section 7(b) suggests a basis for distinguishing facilities used in a pipeline purchase of gas from other facilities of the company. The statute applies to "all or any portion of" a natural gas company's facilities. "Purchasing" facilities are obviously a vital part of a pipeline company's plant; without them the company could not render a transmission service. Furthermore, it is inherently ambiguous—if not meaningless—to attempt to separate "purchasing" from "transmission" or "resale" facilities. A pipeline company's facilities compose a continuous system for the transportation and sale of gas.

It is surely immaterial that in the present case the cost of the facilities installed by the pipeline company was slight. In the first place, the present case may not be typical in this respect. Secondly, we again point out that the statute speaks of "all or any portion" of the natural gas company's facilities. It does not exempt those that are relatively inexpensive. Nor would such a standard be practicable.[11] Furthermore, the statute expressly embraces the abandonment of the *service* rendered by means of jurisdictional facilities. United abandoned not merely physical facilities, but the transportation service being rendered by means of them. While the facilities may have been inexpensive to construct, the service undoubtedly involved a considerable volume of gas having substantial monetary value.

2. To carve an exception to Section 7(b) for facilities and service such as are involved here, and to permit their unregulated abandonment, would subvert the regulatory scheme and the objectives of Section 7.

(a) As we have already suggested (pp. 6-7, *supra*), the plan of Section 7 is to prevent unnecessary or imprudent plant investments and to assure the most efficient utilization of existing facilities. Section 7(c) thus requires that a natural gas company desiring to construct new facilities or initiate

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[11] We also point out that the practical economic effect of the abandonment may be to render useless costly facilities that were constructed by the producer. The facilities constructed by Continental were far more extensive than United's. Statement, *supra*, p. 3.

a new service satisfy the Commission that the step is justified by the public convenience and necessity. Section 7(b), in requiring a similar showing for abandonment of facilities or services, is complementary. If a natural gas company were free to abandon perfectly adequate facilities, the Commission's task under Section 7(c) would be much complicated. It might be forced to approve new facilities that were not actually necessary, simply because the company had imprudently abandoned existing facilities that would have served as well or better. Proper administrative supervision of additions to or extensions of plant requires commensurate control over abandonment of the facilities that may have to be replaced.

United was required by Section 7(c) to obtain the Commission's approval to operate the facilities used to take gas from Continental and to transport gas by means of these facilities. See *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 143 (C.A. D.C.). It would be anomalous to deny the Commission equal authority over the abandonment of the same facilities and service. Presumably, United, if it abandons an existing source, must eventually obtain replacement gas elsewhere, and it will then have to get the Commission's approval for the requisite new facilities and transportation service. The public convenience and necessity may not, however, justify the switch. If the Commission is to retain unimpaired power to prevent the construction of unneeded facilities or the initiation of a superfluous service, it must be able to prevent the premature abandonment of

existing facilities and services which may be wholly adequate and even—from a public interest standpoint—superior to the available substitutes.

(b) Failure to recognize the Commission's authority to prevent abandonments of pipeline "purchasing" facilities would undermine the scheme of the Act in another respect. This Court has held that producers' sales are fully subject to Section 7(b). *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137. But the Commission's function with respect to such abandonments could in many cases be nullified if petitioner's position here prevailed. For then a producer's facilities could be rendered useless by the unilateral action of the pipeline in refusing to purchase beyond the termination of the contract, even though the Commission would not otherwise have permitted abandonment by the producer.

(c) Finally, it is demonstrable that the fundamental regulatory objectives of Section 7—conservation, efficiency, economy of plant—will be impaired if Section 7(b) is denied its literal force and "purchasing" facilities are excepted from its reach.

(1) A pipeline's termination of gas deliveries from a producer may result in a substantial and unjustified wastage of gas. If a new purchaser cannot be found (as might be true if the remaining reserves were limited), the wells will be shut down before the supply has been exhausted. The relevance of this factor to the legislative scheme is plain, for if a natural gas company can show that the available gas supply is so far depleted as to make continuance of the service

unwarranted, it has (under the express terms of Section 7(b)) an absolute right to abandon. Moreover, even if the remaining supply is not permanently lost, abandonment by a regulated pipeline company may result in a permanent diversion of the gas from the interstate market, thereby harming the consumers whom the Act was intended to protect.

(2) The premature abandonment of facilities for the delivery of gas from producer to pipeline may result in needlessly higher costs to the pipeline's customers. The facilities required for direct delivery from wellhead to main transmission line can be costly. If existing facilities linking the pipeline to a particular producer's wells are abandoned, new facilities will often be necessary to enable the pipeline to tap a substitute source of supply. The costs of financing and operating the substitute facilities will be borne by the pipeline's ratepayers, and these costs may be higher than the comparable costs of the existing facilities. Here, again, it is immaterial that in the present case the original cost of the abandoned facilities was slight. Not only may the present case not be representative in this respect, but from the standpoint of the burden to the ratepayers a more pertinent consideration than the cost of the original facilities is the cost of such new facilities as may be required to obtain substitute gas.

(3) Changing the source of supply may produce temporary, but nonetheless serious, delays and disruptions as the producer searches for a new customer and the pipeline for a new supplier. Higher costs

to gas consumers may result. The facts of the present case suggest a further danger—that the pipeline will in the end pay more for gas than if it had not abandoned the existing service (see Statement, *supra*, p. 11 and n. 9). It may seem paradoxical that a pipeline should abandon a cheap source of supply, but it must be remembered that any increased gas costs are ordinarily passed on in full to the ratepayers; price may consequently not be uppermost in the minds of the pipeline's managers. It is, of course, precisely because a regulated public utility is largely immune from the ordinary constraints of competition that Congress has placed the operations of the pipeline companies under comprehensive administrative control.

Considerations of policy similar to those canvassed above led this Court in *Sunray* (p. 16, *supra*) to hold that the producer's selling facilities are subject to the abandonment provisions of Section 7(b). We can think of no rational design that could be ascribed to the Natural Gas Act that would justify a lesser obligation on the pipeline purchaser.[12]

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[12] This Court's reference in *Sunray* to the seller's continuing obligation in that case to deliver gas to the purchaser "on the latter's request" (364 U.S. at 155) does not support petitioner's argument that a purchaser is free to abandon his purchases at any time. We believe that that statement, in context, referred to the purchaser's right, under the particular rate schedule involved in *Sunray*, to call for an additional supply of gas up to 150 percent of the specified annual amount. 364 U.S. at 139. Deliveries of gas to a pipeline are, as a practical matter, normally "on request" deliveries—with or without

In pointing to the dangers of unregulated abandonment of gas purchasing facilities, we do not mean to imply that abandonment of such facilities is never permissible. Often, the loss will be slight and will be outweighed by other considerations. For example, the pipeline may no longer need the gas, or it may have available to it a cheaper alternative source of supply; moreover, if the supply tapped by the facilities in question is exhausted, the Commission must permit abandonment (see p. 17, *supra*).[18] We urge only that these are matters which should be presented to the Commission. We think it clear that Congress

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a contract. Thus, the contract in the *Sunray* case, as is frequently true, required the pipeline either to take certain minimum quantities of gas or else pay for it, even if it was not taken. Quantity variations from season to season and day to day are standard operating procedure dictated by the pipeline's operating program of utilizing its combined supplies to meet its constantly fluctuating load (demand) condition. Plainly, gas will be delivered only on request either during a contract or afterward.

Petitioner also cites (Br. 21) the following statement in the *Sunray* opinion: "It is said that petitioner will be in a position of inequality, because it must supply gas then to United without a corresponding obligation on United to take it" (364 U.S. at 155). But this was not a statement of the Court's position—only of a contention to be answered. As the Commission here noted (R. 404), by prefacing this statement with "'It is said,'" this Court "obviously intended its statement to be read as a paraphrase of counsel's argument, and not as a holding thereon." We emphasize that the issue of the purchaser's abandonment of facilities was not before the Court in that case.

[18] There has been no showing that any of these grounds is present here.

never intended that they be finally resolved by unilateral decision of the pipeline's management.[14]

B. *No Different Conclusion Is Compelled Merely Because the Act Does Not Require Commission Approval of Gas Purchases as Such*

The Natural Gas Act contains no express requirement that purchases, as distinct from transportation and sales, of natural gas be approved by the Commission. Petitioner argues that the Commission's assertion of authority over the abandonment of purchasing facilities is an attempt to supply what Congress studiously omitted. There is no merit to this contention.

1. The Act makes no provision for Commission approval of purchases simply because such a provision would be redundant. The Commission's express statutory authority over transportation (Section 7(c)) necessarily entails broad authority over purchases —authority that petitioner does not challenge.[15] Every

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[14] Congress' unwillingness to cede final decision in matters of abandonment to the pipeline companies is indicated by the rejection in committee, at the time of the deliberations on the Natural Gas Act, of an industry-sponsored amendment to Section 7(b) that would have provided "* * * [t]hat facilities may be abandoned without obtaining such [Commission] permission, approval, or finding, if service is not thereby impaired or if substitute facilities will be installed." See Hearings on H.R. 4008 before House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., p. 127.

[15] This being so, little significance can be attached to the fact that Congress in enacting the Natural Gas Act did not extend its provisions to the "procurement of natural gas"

purchase of gas destined for the interstate market involves transportation that the Commission must approve, and the need for and terms of the purchase are highly relevant in determining whether the transportation is justified by the public convenience and necessity. See, *e.g.*, *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1; *Public Service Commission of New York* v. *Federal Power Commission*, 287 F.2d 143 (C.A. D.C.); *Texas Eastern Transmission Corp.*, 11 F.P.C. 435, 444-445, 449. In addition, the purchase is directly regulated by means of the Commission's broad authority over producer's sales; all producer sales for the interstate market must, of course, be approved under Section 7 (c). See *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672. The short of it is that the Act gives the Commission comprehensive and effective authority over a regulated pipeline's purchases—enough, surely, to establish its legitimate concern with the discontinuance of such purchases through abandonment of jurisdictional facilities and the services rendered thereby.

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as had been proposed in bills that would have regulated only natural gas pipeline companies and not producers. H.R. 5711, S. 1919, 75th Cong., 1st Sess.; see Hearings on H.R. 4008 before House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., pp. 1, 10-20. There was no need. Also, it may have been feared that such a provision would conflict with the production and gathering exemption in Section 1(b). See *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 512-513 and n. 16. That exemption does not support limitations on the Commission's authority after the producer's sale takes place.

2. Even assuming that the Commission had no authority with respect to contracts for the purchase of gas, it would not follow that it lacked authority over discontinuances of gas purchases. For Section 7(b) is plainly broader than 7(c). The former reaches all services rendered by means of jurisdictional facilities, whether or not Commission approval of the service was initially required or obtained. It is thus immaterial to the Commission's 7(b) powers whether gas purchases require such approval.[16]

The distinction between initiation and abandonment of service is a familiar one in public utility regulation. See, *e.g.*, 49 U.S.C. 1(18); *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 144-145, 149. It reflects the fact that customers of a public utility often become acutely dependent upon the continuation of the utility's service, even though initially they may have been free to choose among competing services. Abandonment may disturb settled interests in circumstances where commencement of service does not. Even if Congress had thought that a pipeline's purchasing decisions were not so affected with a public interest

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[16] This position is not inconsistent with this Court's assumption in *Sunray* that a limited-time certificate would permit a producer to discontinue its operations at the certificate's expiration. In that case, the Court assumed only that approval of such a limitation amounted to an authorization under Section 7(b) to abandon the certificated service at the conclusion of the certificated period. The certificate granted United for the operation of these facilities and for transportation of gas by means of them was unlimited in duration. Cf. *Sun Oil Co.* v. *Federal Power Commission*, 364 U.S. 170.

as to require regulation, it would still have had reason to conclude that a decision to discontinue purchasing, because of its potential impact upon producers and existing customers of the pipeline, should be reviewed by the Commission.

The history of Section 7 of the Natural Gas Act make this plain. Originally, the Act required a natural gas company to obtain a certificate of public convenience and necessity only if it proposed to provide service to an area already being serviced by another natural gas company. See 52 Stat. 825. Yet Section 7(b)—unchanged since the original act—has at all times required Commission approval of any abandonment of jurisdictional facilities or of services rendered thereby. Thus, until 1942, when the Commission received its present broad certification powers (see 56 Stat. 83), its authority over abandonment of services was much broader than its authority over their initiation.

II

The Expiration of the Purchase Contract with the Producer Gives the Pipeline No Greater Right of Abandonment

In Point I, we considered whether an exception to the requirements of Section 7(b) of the Gas Act is warranted where the abandoned facilities relate to the acquisition of the gas by the pipeline from the producer. Here we consider the bearing of the purchase contract between pipeline and producer, and argue that United's position is not strengthened by the fact that abandonment was predicated upon the expira-

tion of the contract. Preliminarily, we point out that petitioner's approach was expressly rejected by this Court in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, which holds that a producer may not abandon selling facilities merely because his obligation under the contract has terminated. See, also, *Sun Oil Co.* v. *Federal Power Commission*, 364 U.S. 170.

A. There is no conflict between the Commission's assertion of authority and the terms of United's contract with Continental. The contract provided for purchases at the contract rate during its ten-year term and for termination of the contract at the end of the term. It did not purport to govern the parties' dealings after termination. During the term of the contract, United was entitled to purchase at the contract rate, but upon expiration of the contract that right lapsed and the only restrictions upon the parties' dealings were those of the statute.

To be sure, the scope of free contractual bargaining is somewhat diminished if pipeline and producer may not (without Commission approval) agree that the termination of the contract shall terminate all aspects of the purchasing arrangement. However, that is already the result under decisions of this Court that petitioner does not challenge (*Sunray* and *Sun Oil*, *supra*), which hold that the producer may not cease supplying the purchaser without Commission approval even though his contract with the producer has expired. If one party may not cancel the arrangement unilaterally, neither should the other be entitled to do so. The decision below does no more than create

symmetry in the obligations of producers and pipelines, and we submit that the bargaining process is strengthened—not weakened—by thus placing the parties on a bargaining parity.

B. If there were a conflict here between freedom of contract and fulfillment of the regulatory objectives of the Gas Act, there would be no question which should prevail. Congress did not intend that natural gas companies be free to bargain away the right of the public to efficient service and to the orderly and economical exploitation of the nation's gas resources. Administrative supervision of the contractual arrangements of natural gas companies is indeed comprehensive. The contract between United and Continental in this case was twice reviewed by the Commission: in approving Continental's application for approval of the sale of gas under the contract and in approving the transportation of that gas by United. The Commission could have rejected these applications—thus in effect nullifying the contract. Or it could have imposed under Section 7(e) extensive conditions upon its approval. See, *e.g.*, *Federal Power Commission* v. *Hunt*, 376 U.S. 515; *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378. It could also have modified the contract during its term (see p. 26, *infra*). In light of these extensive powers, we submit that the United-Continental contract cannot be interposed as a bar to requiring Commission approval of abandonment of the facilities employed in the performance of the contract.

United Gas Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332, lends no support to petitioner's position. The

Court held there that a natural gas company was not free to file a rate different from that permitted by a valid and subsisting contract, but it made clear that the Commission retained full power to modify the contract, and permit filing of a different rate, if the public interest warranted. 350 U.S. at 344-345. See, also, *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348. Furthermore, the corollary of *Mobile*, as the Court pointed out in *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Div.*, 358 U.S. 103, 112-113, is that, where the contract permits, seller may unilaterally change his rate—and *a fortiori* where the contract has expired. *Ibid.*; *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 155.

C. This brings us to the final point to be considered: the rate at which United must take gas from Continental after expiration of the contract. Since, as we have argued, United was required to obtain Commission approval before abandoning its purchase arrangement with Continental, the Commission was entirely justified in requiring United to continue its purchases at the post-contract rate filed by Continental while an application for abandonment (if any were made) was being considered and determined. United objected to the rate filed by Continental only on the ground that it was unauthorized, and not because it was unjust, unreasonable or discriminatory. It did not ask that the rate be suspended or that it be collected subject to refund. And, of course, it sought no authorization to abandon. Having been filed and not having been suspended by the Commission, Con-

tinental's rate became the lawful rate, and United was required to abide by it until it received authorization to abandon under Section 7(b).

When its contract with a particular producer to take gas from a particular field expires, a pipeline may have legitimate reasons for discontinuing this source of supply. The supply may be exhausted; the pipeline may no longer need the gas; it may be able to obtain substitute gas cheaper elsewhere. Or, though the source is satisfactory, the post-contract rate filed by the producer may appear undue. In either event, the Act provides perfectly adequate remedies—either abandonment proceedings or rate proceedings. There is no occasion, we submit, to imply a further remedy—unilateral, unregulated abandonment—that runs squarely counter to the fundamental regulatory objectives of the Act. There are many cases where abandonment of a particular source of natural gas supply is a wasteful, disruptive, imprudent, and needlessly expensive response to the change of circumstances brought about by the expiration of the original contract. We submit that the Commission has authority to avert such consequences.

So urging, we do not contend for a novel or strained interpretation of the applicable statutory provision. We ask only that it be given its natural and literal meaning. Section 7(b) requires Commission approval to abandon any jurisdictional facilities or a service rendered by means of them, and United's facilities for taking the gas from Continental in the Johnson Bayou Field are conceded to be jurisdictional. Our reading,

moreover, merely recognizes that the Commission's authority over the abandonment of gas purchasing arrangements is commensurate with its authority under Section 7(c) over their initiation and with its Section 7(b) authority—confirmed by this Court in *Sunray*—over producers' abandonment of facilities used in selling to pipeline companies like petitioner.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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SEPTEMBER 1966.

APPENDIX

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-833 as amended, 15 U.S.C. 717-717w, provides in pertinent part as follows:

Section 4(d) and (e):

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in

writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 5(a):

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

Section 7(b), (c), and (e):

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available sup-

ply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

* * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified ap-

plicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

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Number 49

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

UNITED GAS PIPE LINE COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION,
CONTINENTAL OIL COMPANY,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I.

CONGRESS DID NOT INTEND THAT THE TERM TRANSPORTATION, AS USED IN THE ACT, ALSO INCLUDE PURCHASING

Having previously acknowledged that "Section 1(b) does not explicitly bring within the Commission's regulatory power the purchase of natural gas", the Commission argues in its brief on the merits that its "* * * authority over the transportation of gas subsumes broad regulatory power over purchasing" (F.P.C. Brief, page 9). In an obvious effort to extend its jurisdiction, the Commission strains to interpret "transportation of natural

gas", as used in the Act, to include "purchase of natural gas".(1)

There is no legislative history, or record of industry usage, which suggests that Congress either thought or intended that "transportation" included "purchasing" when applied to natural gas. And having declined to adopt legislation which would have brought the "procurement of natural gas" within the Commission's jurisdiction and having shown by the language in Section 1(b) that it knew "transportation" did not include "sale", it is certain that Congress was not confused as to the meaning of "transportation", and it is equally certain that Congress did not intend that "transportation" include "purchasing".

In *Border Pipeline Company v. Federal Power Commission*, 171 F. 2d 149, D.C. Circuit (1948), the Commission presented the court with a strikingly parallel effort to expand its jurisdiction. There the Commission sought to have the court interpret "interstate commerce" as used in the Act to include "foreign commerce". In rejecting the Commission's efforts the court pointed out that "foreign commerce" had been included in Title III, H. R. 5423, 74th Congress, First Session, but that Congress had failed to adopt that bill as the Natural Gas Act, and the court held it could not write into the Natural

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(1) Curiously this reliance on "transportation" is at variance with the Commission's holding in Opinion 426 (R. 471-489). There the Commission placed its reliance on its authority to authorize the abandonment of "facilities".

Gas Act a provision which Congress had affirmatively omitted. Judge Prettyman, writing for a unanimous court, reiterated familiar principles of statutory construction when he said:

> "We add a further word upon the subject, because the situation with which we are here confronted is of general importance. Questions such as the one presented in this case are properly for the Congress. The circumstances upon which they arise are familiar. Congress uses expressions of established meaning. It takes action of recognized implications; e.g., it strikes from a pending bill a clause of clear import. But the administrative body finds a sufficient penumbra of meaning to justify a claim to more authority than appears upon the face of its grant. It asserts the extended authority and thus forces the issue upon the courts. It asks the courts to divine an intent on the part of Congress and then to decree that the words of the statute spell that intent. Of course, if there be a plain intent, or purpose, or objective, the statute must be deemed to be in pursuit of it, and the courts will enforce that view. But where relatively plain language and congressional conduct of accepted implication point one way and the contrary appears only through strained and complex assumptions and deductions, questions which the administrators may have as to the full intent and desirable scope of the congressional action ought to be addressed to the Congress."

If the Commission's numerous arguments for granting it jurisdiction to regulate the purchasing or procurement of gas are persuasive, the Commission should pre-

sent them to Congress; and, at the same time, it should present additional amendments to the Act needed to guide the Commission in this new area of regulation and to protect the purchaser subject to the new regulation.

Everything about the Act: its legislative history, its statement of jurisdiction, the certificate section, the abandonment section, the right to contract which it preserves, and the Commission's 38 year record of interpretation and enforcement say that the Commission's jurisdiction does not extend to the purchasing or procurement of gas. Nevertheless, in the words of Judge Prettyman, the Commission has chosen to present to this Court its "penumbra of meaning to justify a claim" to the contrary, and this petitioner must reply.

II.

THE OBVIOUS FALLACY IN THE COMMISSION'S *RELIANCE ON THE ABANDONMENT* SECTION OF THE ACT

The Commission's basic position, reflected in its show cause order and in its Opinion, is that it has authority to require purchasing in order to prevent the unauthorized abandonment of facilities. The obvious fallacy in this argument is that the abandonment section of the Act cannot be broader than Section 1(b). If Section 1(b) does not grant the Commission jurisdiction to require purchasing, then the abandonment section cannot do so.

The Commission's discussion of its view of what constitutes an abandonment, and the consequences thereof, cannot extend the Commission's jurisdiction beyond that defined in Section 1(b). Even if a cessation of gas flow constitutes an abandonment of facilities, which United denies, that does not extend the Commission's jurisdiction beyond that defined in Section 1(b).

Plainly, purchasing or procurement of gas does not come within the jurisdictional limits prescribed by Section 1(b), and no amount of reliance on the abandonment section can give the Commission jurisdiction to require purchasing.

III.

THE COMMISSION'S ARGUMENTS WHY ITS JURISDICTION EXTENDS TO PURCHASING

A. Necessary To Prevent Abandonment Of Facilities

As indicated above, the Commission's central argument is that the cessation of flow of gas through United's purchase facilities constituted an abandonment of those facilities and assuredly Congress intended that the Commission have authority to prevent a cessation of purchasing in order to prevent an abandonment of facilities.

The obvious reason for this round-about approach — from facilities, to flows, to abandonment, to purchasing — is that the abandonment section does not include